

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,	)	CR 09-0146-TUC-FRZ(HCE)
Plaintiff,	)	<b>REPORT AND RECOMMENDATION</b>
vs.	)	
Julio Ochoa-Mata,	)	
Defendant.	)	

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Defendant Julio Ochoa-Mata filed a Motion To Dismiss Indictment For Selective Prosecution Or, Alternatively, For Discovery Under Rule 16 (hereinafter "Motion p.\_"). (Doc. No. 18). Defendant's Motion came on for hearing on March 30, 2009.

For the reasons stated herein the Magistrate Judge recommends that the District Court deny Defendant's Motion To Dismiss Indictment For Selective Prosecution, Or, Alternatively, For Discovery Under Rule 16.

**I. CHARGES**

Defendant Julio Ochoa-Mata is charged in one count of a two count indictment<sup>1</sup> with having been convicted of a crime punishable by imprisonment of a term exceeding one year,

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<sup>1</sup>Co-Defendant Silvestre Cervantes-Contreras is charged in Count 2 with being in the United States illegally and in possession of ammunition in violation of 18 U.S.C. §§922(g)(5)(A) and 924(a)(2).

1 i.e., “Possession of Psuedoephedrine [sic] with Intent to Manufacture Methamphetamine, in  
2 case number F055909068-9, in the Superior Court of California, County of Fresno, on  
3 February 22, 2006...” and knowingly possessing ammunition, that is, 500 rounds of Aguila  
4 .380 caliber ammunition, said ammunition being in and affecting interstate commerce in that  
5 it was previously shipped and transported into the State of Arizona from another state or  
6 foreign country, in violation of Title 18, United States Code, Sections 922(g)(1) and  
7 924(a)(2). (Doc No. 6).

## 8 **II. PROCEDURAL HISTORY**

9 Defendant’s Motion To Dismiss Indictment For Selective Prosecution Or,  
10 Alternatively, For Discovery Under Rule 16 came on for hearing on March 30, 2009. At the  
11 hearing no witnesses testified; no documents were introduced into evidence: and no  
12 stipulations were entered into between Defendant and the Government.

## 13 **III. FACTUAL BACKGROUND**

14 On January 10, 2009, Defendant was observed purchasing ammunition from a gun  
15 dealer at a local gun show. (Indictment p.1; Government’s Response To Defendant’s Motion  
16 To Dismiss The Indictment For Selective Prosecution pp.2-3 (hereinafter “Response p.”)).  
17 Defendant opines that the Bureau of Alcohol, Tobacco, Firearms and Explosives “arrests  
18 *numerous* Mexicans in Tucson every year at gun shows. Agents of the ATF *typically* wander  
19 the gun shows in an undercover capacity and observe people *they believe* to be Mexicans  
20 illegally in the country, or on nonimmigrant visa status, and arrest them if *they believe* they  
21 purchase weapons through, for example, a straw party.” (Motion pp. 1-2)(emphasis added).  
22 In Defendant’s case, an undercover Immigration and Customs officer observed two Hispanic  
23 males, Defendant and Co-Defendant Silvestre Cervantes-Contreras, along with a Hispanic  
24 female browsing weapons and ammunition at a gun show. They were later observed at a  
25 booth and heard speaking in Spanish to the booth vendor about purchasing ammunition.  
26 (Response p. 3). Defendant and Co-Defendant were observed producing a large amount of  
27 U.S. currency from their pockets. (*Id.*) Defendant purchased a case of .380 caliber  
28 ammunition and Co-Defendant purchased a half case of .38 Super ammunition. (*Id.*).

1 Defendant and Co-Defendant then went to the parking lot, entered a grey sedan and drove  
2 away. (*Id.*).

3 An Arizona Department of Public Safety officer stopped the vehicle, driven by Co-  
4 Defendant with Defendant as passenger, after observing that the vehicle did not stop at a stop  
5 sign. (*Id.*) The officer determined that both Defendant and Co-Defendant had no legal  
6 authority to be in the United States. (*Id.* at pp.3-4). Defendant was taken into custody and  
7 later fingerprinted. (*Id.* at p. 4). Defendant's fingerprints were determined to match the prints  
8 of an individual identified as Luis Lopez aka Raphael Cardenas. Luis Lopez was determined  
9 to have been convicted of Possession of "Psuedoephedrine [sic] with the Intent to  
10 Manufacture Methamphetamine, a felony..." punishable by imprisonment for a term  
11 exceeding one year in California and was also a fugitive escapee from California. (*Id.* at pp.  
12 2, 4).

#### 13 **IV. DISCUSSION**

##### 14 **A. Whether Defendant was Selectively Prosecuted Because of His Ethnicity**

15 Defendant alleges that: (1) gun dealers, who are overwhelmingly white, as never being  
16 prosecuted for selling firearms or ammunition to one illegally in the United States; and (2)  
17 he inquired of the booth vendor and was informed by same that no identification establishing  
18 his authorization to be in the United States was necessary. (Motion p. 2).

19 To succeed on a claim of selective prosecution, a defendant has the burden of  
20 establishing: (1) others similarly situated have not been prosecuted; and (2) the selective  
21 prosecution of a defendant was based on an impermissible motive. *United States v. Wayte*,  
22 710 F.2d 1385, 1387 (9<sup>th</sup> Cir. 1983) *affirmed* 470 U.S. 598 (1985); *United States v. Wilson*,  
23 639 F.2d 500, 503-04 (9<sup>th</sup> Cir. 1981).

##### 24 **1. Similarly Situated**

25 Defendant opines that the similarly situated group that is not being prosecuted are the  
26 white gun dealers who "are presumably aware that it is [] illegal to sell ammunition to illegal  
27 aliens." (Motion pp. 2-3). Defendant's effort to align and analogize his situation to white gun  
28 dealers is untenable. Defendant is a prohibited possessor by virtue of his felony conviction,

his fugitive status, and/or his illegal status in the United States, while the gun dealer is not. It is unlawful for a gun dealer to sell ammunition to another *knowing or having reasonable cause to believe* that the purchaser is an alien illegally in the United States. *See* 18 U.S.C. §922(d)(5)(A). It is unlawful for a person who: (1) *has been convicted of a felony* punishable by imprisonment for a term exceeding one year; or (2) *is a fugitive from justice*; or (3) *is illegally in the United States*, to possess ammunition. *See* 18 U.S.C. §922(g)(1),(2), and (5)(A). This Court reasonably presumes that Defendant was aware of his status as to any one, some, or all three.

The correct similarly situated group that Defendant must compare himself to would be Caucasians illegally in the United States or Caucasian convicted felons, either of whose alienage is other than Mexican, who the Government does not prosecute for possession of ammunition. Thus, the similarly situated group and Defendant would be the same in all relevant respects except for ethnicity. *See United States v. Aguilar*, 883 F.2d 662, 706 (9<sup>th</sup> Cir. 1989), *superseded by statute on other grounds as stated in United States v. Gonzalez-Torres*, 309 F.3d 594, 599 (9<sup>th</sup> Cir. 2002). Defendant fails to make an initial and adequate *prima facie* showing of such. *United States v. Ness*, 652 F.2d 890, 892 (9<sup>th</sup> Cir. 1981).

## **2. Impermissible Motive**

Defendant merely suggests that his ethnicity alone was the impermissible motive for the Government's prosecution of him. Defendant ignores observations of him and the Co-Defendant that drew heightened scrutiny from the Immigration and Customs undercover agent: browsing firearms and ammunition and later producing a large amount of cash to purchase a case and a half of ammunition. Moreover, when later stopped by a Department of Public Safety officer for a traffic violation, Defendant and Co-Defendant both freely admitted to being in the United States illegally. (Response pp. 3-4). Further investigation revealed Defendant to be a prohibited possessor by virtue of a prior felony conviction for which he was indicted in the instant case.

Defendant has made no showing of discriminatory policies underlying the selection of his case for prosecution. Possession of ammunition by a prohibited possessor, regardless

1 of ethnicity, is not a protected group. Courts are properly reluctant to examine the  
 2 Government's decision to prosecute a case. *Wayte v. United States*, 470 U.S. 598, 608  
 3 (1985).

4           Such factors as the strength of the case, the prosecution's  
 5 general deterrence value, the Government's enforcement  
 6 priorities, and the case's relationship to the Government's  
 overall enforcement plan are not readily susceptible to the kind  
 of analysis the courts are competent to undertake.

7 *Id.* at 607.

#### 8           **B. Discovery**

9           Defendant moves that the Court, alternative to dismissal, order the Government "to  
 10 produce statistics verifying [D]efendant's claims that only Mexicans are prosecuted for this  
 11 offense, not white gun dealers." (Motion p. 3). Defendant has made no showing that the data  
 12 sought is material to preparing his defense; or that the Government intends to use such data  
 13 in its case-in-chief; or that the data was obtained from or belongs to Defendant.  
 14 Fed.R.Crim.P. 16(a)(1) (E)(i)-(iii). Except as provided in Rule 16(a)(1), discovery of  
 15 reports, memoranda, or other internal government documents made by an attorney for the  
 16 government or other government agent in connection with investigating or prosecuting the  
 17 case is not discoverable. Fed.R.Crim.P. 16(a)(2).

18           [T]o obtain discovery on a selective prosecution claim, a  
 19 defendant must present specific facts, *not mere allegations*,  
 20 which establish a colorable basis for the existence of both  
 21 discriminatory application of a law and discriminatory intent on  
 the part of government actors. This is a high threshold. As has  
 been true historically, it will be the rare defendant who presents  
 a sufficiently strong case of selective prosecution to merit  
 discovery of government documents.

22           *United States v. Bourgeois*, 964 F.2d 935, 939 (9<sup>th</sup> Cir. 1992) (emphasis added). This high  
 23 threshold recognizes two distinct policy considerations: "First, courts are ill equipped to  
 24 assess a prosecutor's charging decisions", *Id.* (citing *Wayte*, 470 U.S. at 607); and "[s]econd,  
 25 court oversight of prosecutorial decisions could undermine effective law enforcement." *Id.*  
 26 (citing *Wayte*, 470 U.S. at 607).  
 27  
 28

1       Herein, Defendant has made no showing that the Government does not prosecute  
 2       Caucasians illegally in the United States or Caucasian convicted felons, either of whose  
 3       alienage is other than Mexican, who possess ammunition. The claim, without more, by  
 4       Defendant's counsel that the demographics of the District dictates that Mexicans are  
 5       selectively prosecuted does not suggest that prosecution decisions were based on ethnicity  
 6       so as to compel discovery.

7               The government need not provide discovery on a selective  
 8               prosecution claim simply because law enforcement officials  
 9               focused for a short time on a racially homogeneous criminal  
 10              group.

11       *Bourgeois*, 964 F.2d at 940-41. It is well-established that in order to merit discovery on a  
 12       selective prosecution claim, Defendant must first identify *specific facts* that establish a  
 13       "colorable" basis for both elements of the claim. *Bourgeois*, 964 F.2d at 938 (citing *United*  
 14       *States v. Balk*, 706 F.2d 1056, 1060 (9<sup>th</sup> Cir. 1983)). Defendant has failed in this regard.

#### 14       **V. CONCLUSION**

15       Defendant has failed to make a *prima facie* showing that the Government has declined  
 16       to prosecute other similarly situated, non-Mexican Caucasian felons illegally in possession  
 17       of ammunition. Defendant has failed to make a *prima facie* showing that the Government  
 18       selectively prosecuted Defendant for impermissible motives. Defendant, having failed as to  
 19       both elements of selective prosecution, is not entitled to discovery.

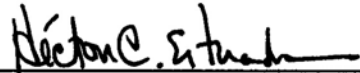
#### 20       **VI. RECOMMENDATION**

21       For the foregoing reasons, the Magistrate Judge recommends that the District Court  
 22       deny Defendant's Motion To Dismiss Indictment For Selective Prosecution, Or  
 23       Alternatively, For Discovery Under Rule 16 (Doc. No. 18).

24       Pursuant to 28 U.S.C. §636(b) and Rule 59 of the Federal Rules of Criminal  
 25       Procedure, any party may serve and file written objections within ten days after being served  
 26       with a copy of this Report and Recommendation. If objections are filed, the parties should  
 27       use the following case number: **CR 09-0146-TUC-FRZ**.

1 Failure to file objections in accordance with Fed.R.Cr.P. 59 will result in waiver of  
2 the right to review.

3 DATED this 1<sup>st</sup> day of April, 2009.

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Héctor C. Estrada  
9 United States Magistrate Judge  
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